

Murderous Intent - The Attitude of a Murderer

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Murderous intent—The attitude of a murderer?

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Abstract

There is a controversy in the definition of murder in England and Wales. This relates to ‘intention’ in the mental element, which can include the defendant’s foresight of death or grievous bodily harm (GBH) as ‘virtually certain’. This ‘oblique’ intent is criticised as morally under-inclusive. In this article, it is argued the crime can better capture those killings that should be categorised as murder by rejecting oblique intent. It is accepted that GBH ought to be a part of the mental element. However, the article proposes murder should capture heinous forms of risk-taking through knowledge of likely death or GBH which, if it were to occur, might be useful in contributing to the defendant’s purpose. This cognitive approach supports a murderous attitude called reconciliation. That attitude is contrasted with the dictionary definition of intention in which death or GBH can be used in pursuit of, or is, the defendant’s purpose.

Keywords

Murder, oblique intention, virtual certainty, knowledge, reconciliation

Introduction

In England and Wales, the mental element in murder has long struggled to capture unlawful homicides that reflect especially heinous forms of risk-taking, despite the relatively settled status of the law.¹ The mental element of murder includes the intention to cause grievous bodily harm (GBH), as confirmed in *R v Cunningham*,² and I am working on the basis this is the correct approach. It is similarly accepted that a purpose to kill or cause GBH, which results in the death of another, should be addressed by transferred malice. However, there are doubts among judges and jurists alike about the meaning of intention. In particular, the idea that it renders the mental element of murder morally under-inclusive because it does

1. *R v Woollin* [1999] AC 82 (HL); [1998] 3 WLR 382 HL [Woollin].

2. *R v Cunningham* [1982] AC 566 HL.

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not label the known likelihood of the relevant risk, which causes death, as murder.³ These have therefore been labelled as manslaughter.⁴ We will see this with examples, which include defendants who commit arson or plant bombs with a purpose of frightening. Only recently, PC Harper similarly died as the result of an attempt to evade arrest, which exposed him to the likelihood of death or GBH. The article will make an original contribution to resolving the disconnect between the law and this moral intuition about murder. It will suggest the mental element for murder should move beyond the dictionary definition of intention,⁵ which includes purpose and a precondition to that purpose, but should reject the notion of oblique intention.

The contribution lies in the use of knowledge in the mental element for murder. Specifically, it should include the defendant's subjective knowledge of likely death or GBH which, if it were to occur, might logically contribute to bringing about the defendant's purpose. This will capture those unlawful killings which should be labelled as murder without abusing the dictionary definition of intention, which does not lead to its ready comprehension in jury trial. We will also see why this is a better way to frame the mental element than oblique intention, intention to expose to a risk, or wicked recklessness. Significantly, although this form of knowledge is technically a side effect and not an immediate motivation for acting, in the same vein as oblique intention, it is not a pure side effect. More significantly, this cognitive description of the mental element will form the basis for an attitude which best reflects that of a murderer. I will call this reconciliation. This is conduct through which the defendant is made to accept the eventuation of death or GBH, rather than an attitude which relates to risking these results. For clarity in jury trial, this also happens to follow the dictionary definition of reconciliation in this context.⁶ Although knowledge relates to circumstances elsewhere in the criminal law, it will avoid references to foresight unless evidence of purpose. In this model, although death or GBH is not used in order to bring about the defendant's purpose, which can be said of a precondition, it is useful to the defendant.

The article will take a rigorous approach to this argument by adopting a normative and doctrinal methodology, based on moral and historical authority, as well as clarity for juries.⁷ Through normative inquiry, the article will be concerned with establishing an ideal, or a model, of what the law ought to be. This inquiry is a doctrinal one, which systematically analyses, identifies difficulties with and attempts to justify the mental element of murder. Moral authority has been described as the 'soundest theory of guilt applicable to the crime in question'.⁸ Historical authority, it has been suggested, relates to 'the main direction in which the case law has been moving in the more or less recent past'.⁹ We will first examine why there is historical authority for the future use of knowledge in the mental element of murder. Next, I will demonstrate how knowledge should be used to form a more satisfactory mental element than oblique intention. Finally, we will see how the relationship between the cognitive element of knowledge and the attitudinal element of reconciliation would impact on case law and on some classic hypothetical examples.

3. Alan Norrie, 'After *Woollin*' [1999] Crim LR 532; Cf Robert Goff, 'The Mental Element in the Crime of Murder' (1988) 104(Jan) LQR 30.

4. Cf House of Commons, *The Report of the Select Committee of the House of Lords on Murder and Life Imprisonment*, HL Paper 78-1 (The Stationery Office, 1989) 488; 'we concluded that it was neither satisfactory nor desirable to distort [intention] in order to deal with the reckless terrorist [who] would in any case be liable . . . to life imprisonment.'

5. <<https://www.collinsdictionary.com/dictionary/english/intention>> [accessed 3 May 2021]: 'a purpose or goal; aim'.

6. <<https://www.merriam-webster.com/dictionary/reconciled>> [accessed 3 May 2021]: 'to cause to submit to or accept something unpleasant'.

7. Jeremy Horder, 'Two Histories and Four Hidden Principles of Mens Rea' (1997) 113 LQR 95 at 95: 'A principle or practice may have authority even if it is acknowledged that it does not command true moral or historical authority: namely, when it is the closest the law can approach moral and/or historical authority whilst retaining the clarity and simplicity necessary for ready comprehension by a jury: see J. Gardner, "Criminal Law and the Uses of Theory" (1994) 14 O.J.L.S. 217 at p. 226.'

8. Ibid.

9. Ibid.

How Did We Get Here?

The mental element for murder is sometimes referred to as ‘malice aforethought’. This is misleading. Murder requires neither malice, in the sense of displaying any kind of attitude in the defendant’s actions towards the deceased, nor aforethought in terms of any premeditated action. The Victorian Criminal Law Commissioners recognised that although Mr Justice Foster described ‘malice’ as “‘a wicked depraved, malignant spirit’” this attitude was not the basis for a clear definition of murder.¹⁰ A cognitive approach to murder, based on the possession of information that constitutes a particular kind and degree of foresight, eventually became the norm.¹¹ Outside of the ordinary language meaning of intention, the question became what degree of foresight amounts to or leads to an inference of intention? This article therefore argues that the law would be clearer if the dictionary definition of intention were kept separate from any foresight-based term used, although foresight clearly has relevance to purpose.¹² The current approach, as we will see, leaves it unclear what kind of foresight amounts, as a matter of evidence, to the conversion of foresight into intention.

The development of the mental element for murder suggests knowledge was part of its definition and it is open to the Supreme Court to include it alongside intention in the future. Murder included ‘(a) An intention to cause . . . death [or] (b) knowledge that the act . . . will probably cause . . . death’.¹³ In evidence to the Select Committee on the Homicide Law Amendment Bill 1874, James Stephen QC had determined that malice could be proven by knowledge and suggested that juries could otherwise be misled by a defence along the following lines: “‘the intention with which this act was done was not to kill anybody at all . . . it was to effect this or that collateral purpose’”.¹⁴ This was seen as a simpler approach than having the judge direct the jury that intention should only be inferred from conduct.¹⁵ Stephen’s view was that juries could not be relied on to infer intention from knowledge.¹⁶ Case law supported this approach.¹⁷ In *Cunliffe*, intention was ‘[that which] X—does more than . . . contemplate [and] decides . . . to bring about . . .’.¹⁸ In *R v Vickers*,¹⁹ murder was defined to exclude (b). In *Hyam*, it did not ‘assist . . . to go back to Stephen’.²⁰ *Vickers* and *Cunliffe* were applied but (b) remained sufficient to convict of murder. Given that *Hyam* has never been expressly overruled, there are legitimate grounds for the Supreme Court to include knowledge in the *mens rea* for murder, rather than an amplified version of ‘knowledge that the act . . . will probably cause . . . death’,²¹ retained through the law of evidence in the test of virtual certainty.

In *Woollin*, Lord Steyn appeared to suggest a result foreseen as virtually certain amounts to an intended result.²² But, in *Matthews* and *Alleyne*, his approach was interpreted as a rule of evidence and not one of substantive law.²³ The model direction endorsed by Lord Steyn also implies that it is a rule of

10. HM Commissioners on Criminal Law, *Fourth Report of Her Majesty’s Commissioners for Revising and Consolidating the Criminal Law* (W Clowes and Sons, London 1839) xxiii.

11. *Hyam v DPP* [1975] AC 55 HL.

12. Criminal Justice Act 1967, s 8.

13. Sir James Stephen, *A History of the Criminal Law of England* (Macmillan and Co, London 1883), Vol 2, 119; The reference to grievous bodily harm has been excluded to focus on intention and knowledge.

14. The House of Commons, Special Report from the Select Committee on Homicide Law Amendment Bill; together with the proceedings of the committee, minutes of evidence and appendix (The Stationery Office, 1874) 54.

15. *Ibid.*

16. *Ibid.*

17. *R v Desmond*, Barrett and Others, *The Times*, 28 April 1868 (Lord Coleridge) [*Desmond*]; ‘if a man did [an] act not with the purpose of taking life but with the knowledge or belief that life was likely to be sacrificed by it [then that is murder]’.

18. *Cunliffe v Goodman* (1950) 2 KB 237 CA at 253 (Asquith LJ) [*Cunliffe v Goodman*].

19. *R v Vickers* [1957] 2 QB 664 CCA.

20. See *Hyam* (n 11) at 59 (Lord Hailsham).

21. See *Stephen* (n 13) at 119.

22. See *Woollin* (n 1) at 390.

23. *R v Matthews and Alleyne* [2003] EWCA Crim 192 at para 45 (Rix LJ).

evidence. Despite the substitution of the word ‘find’ for the word ‘infer’, the jury remain entitled to find intention proven in these circumstances:²⁴

Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to [find] the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case.

This moral discretion is indicative of the lack of descriptive certainty in the law and leaves doubt as to what exactly it is the jury have to find to convert foresight into intention in these particular circumstances. The test is both objective and subjective, constructed in such a way that the jury are put to the task, first, of determining whether death or GBH was virtually certain and, second, whether the defendant actually foresaw this. As the culpability in the second of these criteria overrides the first, it seems unnecessary to resolve the first at all. This was recognised by the Law Commission, which attempted to address this point in its most recent recommendation:²⁵

1. A person should be taken to intend a result if he or she acts in order to bring it about.
2. In cases where the judge believes that justice may not be done unless an expanded understanding of intention is given, the jury should be directed as follows: an intention to bring about a result may be found if it is shown that the defendant thought that the result was a virtually certain consequence of his or her action.

The Law Commission has answered one criticism caused by the *Woollin* direction. But this leaves us with a reliance on oblique intention. A concept that has been regretfully accepted by some judges and jurists in view of its moral under-inclusivity. The discretion given to the jury, because of the ‘moral elbow room’ required by oblique intention,²⁶ is not conducive to ready comprehension of the law and its application to the facts. It suggests the possibility of inconsistent verdicts.

The Fault in Our Knowledge

A significant question mark, which can be levelled against oblique intention, is its description as a side effect of the defendant’s purpose. It is not sought as an end or means to an end. This creates difficulties in distinguishing intention from recklessness and, in turn, murder from manslaughter. Recklessness is only differentiated from oblique intention by the degree of foreseen risk involved in virtual certainty. In an attitudinal context, both can be described as the creation of a risk the defendant accepts. The same can be said of knowledge of probable consequences. In this article, knowledge of probable consequences will be enhanced to reflect those situations where the defendant is reconciled with bringing about the side effect. Because the distinction between recklessness and reconciliation is one of kind and not simply of degree, manslaughter will be clearly and morally differentiated from murder.

In addition to purpose, the law has recognised that the means used to achieve that purpose should fall within the meaning of intention.²⁷ HLA Hart indicated that, morally, this may be so because the individual sought to use the prohibited result.²⁸ It is clear that the test of virtual certainty is not a case of use and is a side effect of purpose. Because it is a practical certainty—something that will happen in

24. See *Woollin* (n 1) at 96 (Lord Steyn).

25. Law Commission, *Murder, Manslaughter and Infanticide* (HMSO, London 2006), Law Com No 304, para 3.27.

26. Jeremy Horder, ‘Intention in the Criminal Law—A Rejoinder’ (1995) 58 MLR 678 at 688.

27. *R v Mohan* [1976] QB 1 CA.

28. HLA Hart, ‘Punishment and Responsibility, *Essays in the Philosophy of Law*’ in John Gardner (ed), (2nd edn OUP, Oxford 2008) 127.

the ordinary course of events—it is sometimes referred to as a moral certainty.²⁹ This suggests it ought to be the moral equivalent of purpose, or the means used to accomplish it, but a side effect is not sought.

The question is whether there is a better way to link a side effect to the defendant's purpose than foresight of the collateral result as virtually certain. While a means to an end, or precondition, is in line with the defendant's purpose, a side effect of bringing about that purpose might not have been known to logically contribute to that purpose. Where the side effect might have been known to logically contribute to that purpose, this should be enough to suggest that the defendant is reconciled with, or made to accept, the eventuation of the unintended side effect. The question for a jury would be whether defendants must have known that if the likelihood of death or GBH were to occur, this might logically contribute to bringing about their purpose. We will see some examples, which illustrate the point.

Cognitive and Attitudinal

Once we begin to examine these cognitive mental elements we see that they reflect, in some way, certain attitudes towards the prohibited result. A cognitive state of mind, such as foresight of a particular result, followed by the voluntary conduct that brings about that result, can reveal an attitude towards that result. Antony Kenny and HLA Hart described purpose and means respectively as an attitude of pursuit.³⁰ Virtual certainty appears to reflect a gross form of indifference or a could-not-care-less attitude.³¹ There are, however, some other candidates when it comes to the mental element for murder. For example, Pedain, as we will see, argues that the attitude of endorsement better captures those killings that ought to morally be classified as murder.³² It does so through the cognitive description of an intention to expose to a risk. Crucially, this involves endorsement of the risk-creation rather than its eventuation.³³ The defendant who endorses the risk cannot meaningfully disassociate him or herself from the risk with an active or latent wish it does not eventuate.³⁴ The creation of the risk would be useful.

In Scotland, the mental element for murder has long relied on the attitude of wicked recklessness.³⁵ This means an objective form of risk-taking is sufficient and can be criticised on the grounds that the mental element for serious crimes should be based on a cognitive type of risk-taking. Nonetheless, this culpable disregard has been seen as a sufficiently egregious attitude. In South Africa, outside of purpose, and foresight of a substantial certainty (i.e. *dolus indirectus*),³⁶ murder includes the defendant's foresight that death is possible and that he or she is reconciled with that outcome (i.e. *dolus eventualis*): the possibility is accepted into the bargain.³⁷ The idea that the possibility is accepted into the bargain does not tell us much about the function of this attitudinal element. The attitudinal element of reconciliation is seen as a further requirement of *dolus eventualis*, rather than an implication of that cognitive test.³⁸ However, a cognitive mental element and its attitudinal implication is clear for the jury to understand and avoids the risk of inconsistent verdicts based on an attitudinal mental element alone. In Germany,

29. See Woollin (n 1) at 391 (Lord Steyn); Cf Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles* (HMSO, London 1993), Law Com No 218, paras 7.6–7.14.

30. Anthony Kenny, *Freewill and Responsibility* (Routledge and Kegan Paul Ltd: London, Henley and Boston, 1978) 46; Cf HLA Hart (n 28).

31. Cathleen Kaveny, 'Inferring Intention from Foresight' (2004) 120 LQR 81 at 86.

32. Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579.

33. *Ibid.*, at 590–91.

34. *Ibid.*, at 584.

35. *R v Cawthorne* 1968 SLT 330.

36. *State v Masingili* 2014 (1) SACR 437 (CC) at para 36 (Van der Westhuizen J).

37. *State v Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014) 3347.

38. Kelly Phelps, 'The Role of *Error in Objecto* in South African Criminal Law: An Opportunity for Re-evaluation Presented by *State v Pistorius*' (2016) 80 J Crim L 45 at 49.

where there is a similar concept, the defendant would intend a result if it is not a completely remote possibility and would at least be reconciled with it, if not approve of it.³⁹ However, note that neither jurisdiction has a concept of subjective recklessness equivalent to that in England and Wales. Germany has advertent negligence, which is distinguished by a genuine reliance on the non-occurrence of the result.⁴⁰ The point can be made that reconciliation in this cognitive and attitudinal model has not been clearly delineated.⁴¹

It has been seen that many of the mainstream candidates for the mental element of murder involve both cognitive elements and attitudinal equivalents. Few would argue that purpose, or a precondition to that purpose, should not be included. Pursuit of death or GBH is surely a murderous attitude. But beyond that, how can knowledge represent reconciliation and why should it be sufficient for a murder conviction notwithstanding foresight of virtual certainty? This article offers reconciliation as a candidate to replace virtual certainty through the following cognitive element: where the defendant knows that the likelihood of death or GBH, if it occurs, might logically contribute to his or her purpose. This is technically a side effect. Death or GBH is not sought as a purpose or used as a means to a purpose. It is, however, useful to the defendant's purpose, although not a motive or reason for acting. Unlike intention to expose to the risk, the defendant is reconciled with or made to accept the risk's eventuation.

Why Should We Accept Reconciliation?

To answer this question, we need to address what it is we are looking for. Outside of purpose, and a precondition to that purpose, what should the norm be? The difficulty with oblique intention is that death or GBH is not sought as an end or a means to an end. Even if the result is foreseen as virtually certain, which would put it on a spectrum of risk-taking to which recklessness or knowledge of probable consequences belong, it does not say much about whether we would want to consider this morally reprehensible enough to deserve the label murder. We could say the defendant couldn't care less, but the defendant might hope death or GBH does not happen and be relieved when death does not occur. The point is that the eventuation of the oblique intent is not foreseen as useful by the defendant. The proposition will therefore need something more than a known likelihood of death or GBH. Reconciliation is redefined as the known possibility of a logically useful contribution to the defendant's purpose. We can stress test this against the alternatives put forward.

Alan Norrie has noted the moral under-inclusivity of the virtual certainty test, which can be addressed through '*moral*' ("wicked", "depraved") recklessness' in Scotland, can only be dealt with through foresight of death or GBH as probable, in a '*Hyam*-type test', in England and Wales.⁴² Wicked recklessness, which involves acting regardless of the risk of death or GBH, not caring whether the victim lives or dies, has nonetheless received extra-judicial support from Lord Goff.⁴³ The law's 'cognitive language',⁴⁴ as Norrie puts it, is insufficiently flexible from a moral standpoint and can be 'at serious moral odds' with the defendant's intention.⁴⁵ Neither wicked recklessness, nor knowledge of probable consequences, necessarily mean the prohibited result was foreseen as useful by the defendant. The defendant who is wickedly reckless disregards this result. Norrie acknowledges that although foresight of probable death or GBH, as expressed in *Hyam*, 'carries moral information' it does not describe the moral attitude of the defendant in any detail.⁴⁶

39. BGH, *NSIZ* (1999) 508.

40. BGH, *NJW* (1979) 1512.

41. Greg Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) OJLS 99.

42. See Norrie (n 3) at 542.

43. Goff (n 3).

44. See Norrie (n 3) at 543.

45. *Ibid.*, at 538.

46. *Ibid.*, at 543.

Antje Pedain has argued the fire and terrorist examples demonstrate the defendants endorse or approve of the creation of risk.⁴⁷ They do not simply have a ‘could-not-care-less’ attitude of indifference but approve of the risk because they intentionally expose the victim to it. They do not aim for the risk to eventuate, but they need to create the risk in order to frighten or draw attention to it.⁴⁸ This has some judicial support in *Hyam*, where Lord Hailsham referred to an ‘intention to expose a potential victim to that risk’.⁴⁹ In the terrorist example, which was discussed in *Woollin* in terms of a bomb disposal expert’s death, the result is not necessarily foreseen as virtually certain and this could be applied, as Pedain suggests, to a passer-by, which would render a murder conviction impossible.⁵⁰ Pedain reckons the result is not ‘in any way useful to [the terrorist] as a means or an end’.⁵¹ According to Pedain, it is not useful to the terrorist to have death or GBH eventuate, but the risk of it is useful and instrumental to his end.⁵² Therefore, the risk of death or GBH is foreseen as useful by the defendant but not its eventuation.

A philosophical account of direct and oblique intention could count them as morally equivalent, because both involve the defendant’s choice in terms of intention or foresight. A decision to bring about a state of affairs, ‘so far as in him lies’, has legal authority in *Cunliffe v Goodman*.⁵³ In *Hyam*, Lord Hailsham stated that he knew of ‘no better judicial interpretation’ of intention.⁵⁴ John Finnis has argued that ‘in choosing, one adopts a proposal to bring about certain states of affairs’.⁵⁵ A commitment to bringing this about, through what Finnis calls our ‘instrumental and basic’ purposes, reveals an identification with the proposal.⁵⁶ A choice to bring about death or GBH is different from choosing to risk it and from choosing its likelihood as a possible, logical, contribution to purpose. The language of use and usefulness can help us to understand how a defendant identifies with the prohibited result.

Michael Bratman has distinguished between choice and intention. In his view, there is an important difference between a ‘Terror Bomber’, who bombs a school to kill its children and terrorise, and a ‘Strategic Bomber’, who bombs a factory next door to the school and knows when the factory is bombed the school will also be destroyed along with its children.⁵⁷ Both choose to kill, but the Strategic Bomber would not adapt his plans to ensure the children are killed and does not, therefore, intend to kill.⁵⁸ This supports the idea that the Terror Bomber is in pursuit of the children’s death, even if it is used as means to terrorise, which is quite different from the Strategic Bomber, for whom the deaths are (reluctantly?) accepted as a side effect, but are not useful in destroying the factory. Imagine, however, that it was not a school but a university research centre and not a factory but a laboratory. Where the purpose is to prevent the production of a vaccine and eminent scientists in that field of expertise will likely be killed or caused serious harm as a side effect, the Strategic Bomber knows that the deaths of the scientists might contribute to that purpose, even if they are accepted reluctantly. This side effect logically helps to bring about the prevention of vaccine production. We can say that the Strategic Bomber must have been made to accept that outcome and can note that it is not dependant on knowing that the deaths will happen.

Antony Duff has suggested that failure explains the difference between intention and foreseen risk-taking: the defendant would be disappointed if his direct intent did not come about, but the defendant who foresees and takes a risk could plausibly claim that he or she would be relieved if the risk did not

47. See Pedain (n 32).

48. *Ibid.*, at 590–91.

49. See *Hyam* (n 11) at 79.

50. See Pedain (n 32) at 583.

51. *Ibid.*

52. See Pedain (n 32) at 583 and 591.

53. *Ibid.*, at (n 18).

54. See *Hyam* (n 11) at 74 (Lord Hailsham).

55. John Finnis, ‘Intention and Side-Effects’ in Raymond Frey and Christopher Morris (eds), *Liability and Responsibility: Essays in Law and Morals* (CUP, Cambridge 1991) 32 at 61.

56. *Ibid.*

57. Michael E Bratman, *Intentions, Plans, and Practical Reason* (Harvard University Press, Cambridge 1987) 139.

58. *Ibid.*, at 163.

eventuate.⁵⁹ If, for example, a defendant bombed a prison wall in order to free prisoners and killed collateral victims,⁶⁰ the defendant might be said to have plausibly hoped that no one would die. In the context of reconciliation, however, if the defendant knew that prison guards would likely be killed or seriously injured in the blast, the defendant must have logically been made to accept its contribution and usefulness to the prisoners' liberation. Duff accepts the idea of an intention to expose the victims to a risk,⁶¹ but this does not, as we have seen, translate to the usefulness of the risk eventuating.

Victor Tadros has argued that intention depends on motive: results are intended if they formed a reason that motivated the defendant to act.⁶² The dividing line between intention and recklessness, according to Tadros, is based on reasons that motivated the defendant to act or reasons against acting that demotivated the defendant from acting, but despite which the defendant acted.⁶³ David Ormerod and Karl Laird have suggested that the courts should avoid this sort of complex reasoning.⁶⁴ If the defendant is said to have intended death or GBH, as a means or an end, then Tadros has adequately underlined an attitude of pursuit. If knowledge is required, there is nothing complicated about directing a jury that defendants must have known their conduct would likely cause death or GBH and might logically contribute to their purpose. Although this was not a motive for acting these defendants can nonetheless be said to have known the prohibited result might be useful.

There is some legal authority for the idea that the definition of intention should include 'the inseparable consequences of the end as well as the means'.⁶⁵ Andrew Simester and Winnie Chan have argued that where the direct intent is inseparable from the oblique intent the latter is also intended and that this is not a matter of empirical certainty.⁶⁶ Simester has also contended that a result foreseen as virtually certain is insufficient and that inseparability is somehow conceptual in nature, although not necessarily based on entailment.⁶⁷ Simester and Chan approved Hart's definition:⁶⁸ namely, that the oblique intention 'is so immediately and invariably connected with the action done that the suggestion that the action might not have that outcome would by ordinary standards be regarded as absurd...'.⁶⁹ But no one claims inseparability involves logical entailment of the purpose with its side effect. It seemingly lacks clear definition.

We can demonstrate the value of the relationship between cognitive and attitudinal mental elements. In the context of the means to an end, we can say that defendants foresee the use of death or GBH in accomplishing their purpose and, therefore, are in pursuit of it. Similarly, when it comes to knowledge that the likelihood of death or GBH, if it occurs, might logically contribute to their purpose, we can say that defendants know death or GBH might be useful in bringing about their purpose. They are reconciled with its eventuation and are not simply accepting the side effect as a foreseen risk, however likely or certain. These defendants must have been made to accept its occurrence might play a part in bringing about their purpose. Suppose these defendants' purpose is conditional on not bringing about death or GBH, but they know there is a likelihood of death or GBH and that, logically, the eventuation of the risk might contribute to bringing about their purpose. In acting they have reconciled themselves to death or GBH.

59. RA Duff, *Answering for Crime* (Hart Publishing, Oxford 2007) 151.

60. See Desmond (n 17).

61. See Duff (n 59); Cf Kimberly Kessler Ferzan, 'The Structure of Criminal Law' (2009) 28 CJ Ethics 223 at 235; Kessler Ferzan argues that the intention to expose to a risk is a difference in degree, rather than in kind, from recklessness. In attitudinal terms, she identifies the former as an extreme form of indifference.

62. Victor Tadros, *Criminal Responsibility* (OUP, Oxford 2005) 202.

63. *Ibid.*

64. David Ormerod and Karl Laird, Smith, *Hogan and Ormerod's Criminal Law* (15th edn OUP, Oxford 2018) 96.

65. See Hyam (n 11) at 74 (Lord Hailsham).

66. Winnie Chan and Andrew Simester, 'Intention thus Far' [1997] Crim LR 704 at 715.

67. Andrew Simester, 'Moral Certainty and the Boundaries of Intention' (1996) 16 OJLS 445 at 457.

68. See Chan and Simester (n 66).

69. See HLA Hart (n 28) at 120.

What Impact Would It Have On the Law?

What impact would this approach have on the outcome of real and hypothetical cases? Reconciliation will be critically compared with the current law, endorsement and wicked recklessness, all of which have some support from judges and jurists. This will enable us to say that the concept has moral and historical authority. We will also need to consider whether it is readily comprehensible by a jury.⁷⁰

R v Long, Cole, and Bowers (2020)

How do the various approaches work in a case which involves a purpose to escape? This is not the first time it has happened.⁷¹ PC Andrew Harper's sad death has understandably received much coverage in the media. PC Harper unwittingly stepped into a tow rope attached to a car, which then made off, dragging him down a road for over a mile at an average speed of over 40 mph. Mr Justice Edis made the following remarks when sentencing: the driver, Henry Long, deliberately decided to expose PC Harper to a risk of death;⁷² Long did not realise that PC Harper was caught up in the tow rope until he became detached.⁷³ It did not appear to be the driver, Henry Long's, purpose to kill or cause GBH, rather he (and his accomplices in the car) seem to have had escape in mind. The defendants were cleared of murder and convicted of manslaughter. A failure to convict of murder, if the test of virtual certainty were used, is explained by Mr Justice Edis's remark that Long did not know PC Harper was caught up until he became detached. Despite that remark, it is unclear Long would have had a purpose of exposing PC Harper to a risk of death or GBH. This risk was rather a side effect of seeking to escape. Intentionally exposing PC Harper to that risk would not have been useful to the defendants in its own terms. In the context of wicked recklessness, it would have been open to the jury to find the defendants acted regardless of the risk, not caring whether PC Harper was killed. Reconciliation would seemingly lead to a murder conviction in these circumstances had Long been found to know PC Harper was caught up. In that version of events, Long would have known death or GBH was a likelihood which, if it occurred, might logically contribute to his purpose of escape. The death or GBH of PC Harper might have meant their escape could not be prevented or reported to officers.

R v Stringer [2008] EWCA Crim 1222

The appellate decisions have dealt with a number of murder charges in which a house fire led to death. The evidence suggested that the defendant had poured accelerant around the bottom of the stairs and hallway in his home before setting it alight and walking away. At the time, the occupants of the house were upstairs and asleep. The prosecution used evidence from a number of children that the 15-year-old defendant had threatened to set fire to his house and kill his mother, who was one of the occupants. In the ensuing fire the defendant's brother died and Stringer was convicted of murder. In Lord Justice Toulson's view, it was unrealistic to expect all of the occupants to escape from the upstairs windows without suffering GBH.⁷⁴ In *R v Moloney* [1985] AC 905 (HL), Lord Bridge suggested that no reasonable jury would reach the conclusion that death was not foreseen as virtually certain to occur.⁷⁵ But a conviction of murder on similar facts was quashed in *R v Nedrick* [1986] 1 WLR 1025. The instant case should have been prosecuted as a straightforward case of purpose on the evidence. However, the police had asked the defendant whether death or GBH was virtually certain to occur in hindsight and this misuse of virtual certainty was crucial evidence at the trial. What is the benefit of a relatively settled definition of the mental element for murder, if prosecutorial

70. See Horder (n 7).

71. Cf *DPP v Smith* [1961] AC 290 HL.

72. <<https://www.bbc.co.uk/news/uk-england-46544144>> [accessed 3 May 2021].

73. <<https://www.independent.co.uk/news/uk/crime/pc-andrew-harper-manslaughter-sentence-prison-court-trial-a9647981.html>> [accessed 3 May 2021].

74. *R v Stringer* [2008] EWCA Crim 1222 at para 38 (Toulson LJ).

75. *R v Moloney* [1985] AC 905 HL 926.

discretion leads to its misunderstanding?⁷⁶ There was no intention to expose to a risk, here, such as in order to frighten. Reconciliation is not needed here. Neither is wicked recklessness. The defendant's foresight that the risk could eventuate is evidence of his purpose, along with the threat.

Hyam v DPP [1975] AC 55 HL

In this case, Mrs Hyam set fire to Mrs Booth's home and she ensured that her ex-partner was not in the house when she did it. She maintained she had only intended to frighten Mrs Booth. Mrs Hyam was convicted of murder on the basis that death or GBH was foreseen as a probable result. Mrs Booth's children died in the ensuing fire. There is no purpose to kill or cause GBH here. It is unclear whether death or GBH would have been foreseen as virtually certain in these circumstances. The defendant did intend to expose Mrs Booth to a risk of death or GBH in order to frighten.⁷⁷ It can be said that Mrs Hyam was wickedly reckless, given that she acted regardless of the risk and indifferent to the victims' death or GBH. Reconciliation is fulfilled here on the basis that Mrs Hyam must have known there was a likelihood of death or GBH which, if it occurred, might have logically contributed to her purpose of frightening. Had the occupants suffered GBH in the shape of burns before they died, this might have frightened them. Had the children died before Mrs Booth, this might have frightened her. Mrs Hyam's purpose was to frighten. A purpose of frightening without bringing about death or GBH if possible is a conditional purpose, which denies the possibility of the logical contribution death or GBH could make to bringing about fright. Mrs Hyam demonstrated this by ensuring her ex-partner was absent.

A Terrorist Plants a Bomb to Appear Dangerous. Academics and the judiciary alike have reluctantly accepted that numerous terrorist examples of fatal risk-taking do not fall within the current test of virtual certainty. One such example was put forward by Pedain and similar examples involve a purpose of gaining attention for a cause.⁷⁸ It is not the terrorist's purpose to cause death or GBH here. Neither is death or GBH foreseen by the terrorist as virtually certain. The terrorist does, however, endorse the creation of the risk. Wicked recklessness is not straightforward in this example. Whether the defendant could be said to act regardless of the risk and not caring whether the victims live or die would depend on an assessment of any warning given. Reconciliation would convict this terrorist of murder, for whom the likelihood of death or GBH, if it were to occur, might logically contribute to his or her purpose. Unless any warning given by the terrorist meant there was no known likelihood of death or GBH, the terrorist should be labelled as a murderer, because death or GBH might logically contribute to the purpose of appearing dangerous. It is, however, questionable whether defendants would see themselves as successful in this scenario if their purpose were to gain attention. Negative attention might not be seen by them as furthering their cause. Nonetheless, if the attention sought means the known likelihood of death or GBH, defendants cannot disassociate themselves from the eventuation of that risk when they know it logically contributes to some sort of attention. It can only be defined as seeking attention without causing death or GBH if possible. It is hard to differentiate this from terrorists whose purpose is to similarly frighten. These kinds of terrorists, who seek attention through the known likelihood of death or GBH, are made to accept, or are reconciled with, death or GBH as a logical contribution to bringing about their purpose.

A Passenger Aircraft Is Bombed for Insurance on a Parcel. This sort of hypothetical example is one used in support of the test of virtual certainty.⁷⁹ It is not the purpose of the defendant to kill or cause GBH, but rather to destroy a parcel on the aircraft while it is in flight. The deaths of the occupants might have been foreseen by the defendant as virtually certain to occur in the ordinary course of events. The risk of death or GBH is not endorsed for its own sake. It is, however, an example of wicked recklessness. The defendant has acted regardless of the risk and indifferent to death or GBH. Reconciliation would also lead to a murder

76. See Cf Woollin (n 1).

77. See Pedain (n 32) at 587.

78. Ibid., at 583–84; Cf Goff (n 3) at 50.

79. Glanville Williams, 'Oblique Intention' (1987) 46(3) CLJ 417 at 423.

conviction. The defendant must have known death or GBH was a likelihood which, if it were to occur, might logically contribute to his or her purpose of destroying the parcel on the aircraft. This is because the pilots could be killed or seriously injured by the blast, or the aircraft could be fatally compromised with the same result, which would eventually lead to the destruction of the parcel. If the yield of the bomb were large enough to destroy the aircraft in its entirety, it would be difficult to say the deaths of the passengers were separable from the defendant's purpose, whatever the motive of the defendant.

Conclusion

This article sought to determine a norm for the mental element of murder, beyond intention in terms of purpose or a means to that purpose. This dictionary and legal language definition of intention has moral and historical authority. It is clear for a jury to understand. The same cannot be said of virtual certainty and oblique intention. We have seen that the best candidate to replace this meaning of intention is knowledge, which should be distinct from foresight as evidence of purpose. It is readily intelligible to a jury and has historical authority as a mental element for murder. We have seen it can be used in a morally sound way. This fulfils the criteria for the legal authority of a principle or practice.

This knowledge that the likelihood of death or GBH, if it occurs, might logically contribute to the defendant's purpose is a viable replacement for virtual certainty. Unlike virtual certainty, it suggests a murder verdict would be returned in the terrorist example. Unlike endorsement, reconciliation identifies the defendant with the eventuation of the risk. Unlike wicked recklessness, it does not risk inconsistent verdicts and remains readily comprehensible by a jury.

The current test of virtual certainty, to the extent it is a substantive rule of law, attempts to differentiate murder from manslaughter by using a concept that is not different in kind but in degree from recklessness. Knowledge that the likelihood of death or GBH, if it occurs, might logically contribute to the defendant's purpose, is different in kind from recklessness in an important way. There is no scope for the defendant to reject, be disappointed by, or hope against an outcome that contributes to the purpose sought through conduct.

Reconciliation is no more the moral equivalent of pursuit than oblique intention is the equivalent of purpose. However, if we are to move beyond the paradigm of what the mental element of murder ought to be, which involves a purpose to kill or cause GBH, then it is fairer to give this ground to a concept that demonstrates the relevance of them to the defendant's purpose. Surely it is better to say defendants knew the likelihood of death or GBH might logically contribute to their purpose, rather than death or GBH will accompany that purpose? Morally, the mental element proposed is not simply a foreseen side effect but reflects an appropriate attitude to convict of murder.

With reconciliation, death or GBH is not used by but is useful to the defendant, which cannot be said of the side effect involved in virtual certainty. It offers a means of clarifying the attitude of reconciliation in a cognitive context, where a defendant is made to accept, or is reconciled with, the eventuation of the risk. At the least, it would represent a valuable supplement to the law in England and Wales. This reflects the position in South Africa where *dolus eventualis* and *dolus indirectus*—a foresight of substantial certainty—have coexisted.

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